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IN THE

# Supreme Court of the United States

October Term, 1943. No. 270.

**STANLEY F. WALLACE,**

*Petitioner,*

v.

**DELAWARE RIVER FERRY COMPANY OF NEW JERSEY,**

*Respondent.*

## RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS.

SAMUEL H. RICHARDS,
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# INDEX


PAGE

I. Official Reports of Opinions of Courts Below .... 1

II. Jurisdiction ..... 2

III. Statement of Case Material to Questions Involved 3

(a) History of Case ..... 3

(b) Factual Statement ..... 4

IV. Argument ..... 7

1. The judgment of the New Jersey Court of Errors and Appeals in affirming the judgment of the New Jersey Supreme Court, which, in turn, affirmed the judgment of the trial court, is proper in the light of the federal statutes, and the decisions construing said statutes, and is not in conflict with same ..... 7

2. Purpose of Writ of Certiorari ..... 12

V. Conclusion ..... 13

## TABLE OF CASES AND STATUTES.


PAGE

Atlantic Coast Line R. Co. v. Davis, 279 U. S. 34 ..... 12

Baugham v. N. Y. P. & N. R. Co., 241 U. S. 237 ..... 12

Buffalo and Grand Island Ferry Co. v. Williams, 25 F. (2d) 612 ..... 11

Calmar S. S. Corporation v. Taylor, 92 F. (2d) 84 certiorari denied, 303 U. S. 643 ..... 11

Chicago M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472 7

DeZon v. American President Lines, 317 U. S. —, 63 Sup. Ct. Rep. 814 ..... 7

Great Northern R. Co. v. Knapp, 240 U. S. 464 ..... 12

Gulf M. & N. R. Co. v. Wells, 275 U. S. 455 ..... 7, 12

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co. 240 U. S. 251 ..... 12

Missouri Pac. R. Co. v. Aeby, 275 U. S. 426 ..... 7

New Orleans & N. E. R. Co., et al. v. Harris, 247 U. S. 367 ..... 7

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333 .... 12

Union Ins. Co. v. Smith, 124 U. S. 405 ..... 11

Act of March 4, 1915, c. 153, § 20, 38 Stat. 1185; as amended June 5, 1920, c. 250, § 33, 41 Stat. 1007; 46 U. S. C. A. 688 ..... 2, 3

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

## OFFICIAL REPORTS OF OPINIONS OF COURTS BELOW.

The opinion of the Camden County Common Pleas Court in granting respondent's motion for a non-suit at the close of petitioner's case is not officially reported but appears in the record at page 86. The opinion of the New

Jersey Supreme Court, affirming the action of the Camden County Common Pleas Court is reported in 127 N. J. L. 513. The opinion of the New Jersey Court of Errors and Appeals, affirming the decision of the New Jersey Supreme Court, is reported in 130 N. J. L. 216.

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## JURISDICTION.

This case involves the right of the petitioner to recover damages under the Jones Act. (Act of March 4, 1915, c. 153 § 20, 38 Stat. 1185; as amended June 5, 1920, c. 250, § 33, 41 Stat. 1007; 46 U. S. C. A. 688) At no time during the course of the proceedings in the state courts did petitioner specially set up or claim either a violation of his constitutional right to a trial by jury, guaranteed by the Seventh Amendment to the Constitution of the United States, or a violation of Article 3, Section 2 of the Constitution of the United States. Respondent therefore respectfully submits that petitioner has not brought himself within this Court's jurisdiction so far as any constitutional right, title, privilege or immunity is concerned.

The sole federal question is whether the three state courts, which have heretofore considered this case, erred in determining that petitioner had not sustained the burden of proof imposed upon him by law.

## STATEMENT OF CASE MATERIAL TO QUESTIONS INVOLVED.

### (a) History of case.

In 1938, petitioner instituted suit in the Camden County Common Pleas Court, under authority of the Jones Act (Act of March 4, 1915, c. 153, § 20, 38 Stat. 1185; as amended June 5, 1920, c. 250, § 33, 41 Stat. 1007; 46 U. S. C. A. 688) to recover for personal injuries sustained in the course of his employment as a deckhand on respondent's ferry boat. The allegations of negligence were as follows:

"7. The negligence of the servants, agents and employees of the defendant company consisted in this: that the gangplank over which passengers carried by the defendant company walked from the boat to the slip was carelessly, negligently and recklessly permitted to lay on the slip, extending beyond the edge of said slip; that the said gangplank was not properly and carefully fastened at the side of the dock in the place properly reserved for its keeping." (Complaint—R. 2)

At the close of petitioner's case, respondent moved the trial court for a non-suit on the ground that the petitioner had failed to prove any actionable negligence, (R. 86), which motion was granted (R. 86 to 88). Upon appeal, the action of the trial court was affirmed by the New Jersey Supreme Court (R. 107 to 111). Petitioner thereupon appealed to the New Jersey Court of Errors and Appeals, and on May 18, 1943, that court affirmed the judgment of the New Jersey Supreme Court for the reasons expressed in the opinion of that court (R. 116).

**(b) Factual Statement.**

The pertinent facts are:

1. Petitioner, Stanley F. Wallace, was employed by the respondent, The Delaware River Ferry Company of New Jersey, on July 7, 1923, on its ferry boats which it operated in interstate commerce between Camden, New Jersey, and Philadelphia, Pennsylvania. (Stipulation—R. 95)

2. Between 7:00 and 7:30 P. M. on June 25, 1936, while petitioner was working for respondent as a deckhand on the ferry boat, "Atlantic City", he sustained an injury at South Street ferry terminus, Philadelphia, Pennsylvania, as the boat was being docked (Stipulation—R. 95).

3. The locale of the accident may be described as follows:

a. The ferry boat as it is being docked comes into the "rack" or "slip" (which consists of two rows of pilings, one on each side of the boat, which guide the boat to the bridge) (R. 21, 35).

b. Connecting the ferry boat with the shore is the "bridge", the shore end of which is fixed while the boat or water end, which is elliptical to fit the boat, is raised or lowered by a wheel and chains to meet the level of the boat, depending on the tide (R. 19, 27).

c. Running lengthwise down the bridge and separating the two passenger walkways on the outside from the motor vehicle passageway in the center are two heavy wooden "swingbacks" which protrude about sixteen to eighteen inches beyond the elliptical or river end of the bridge and rest on the boat (R. 34).

d. In addition to the wheel and chains which raise and lower the bridge, there are on either side of the bridge "pulling in wheels" to which are connected ropes with hooks on the ends thereof, which hooks are fastened to eyes on the shore end of the boat, constituting the mechanism which holds the boat fast to the bridge (R. 20, 21, 26).

e. There is also a "footboard" which is placed over the juncture of the boat and the bridge (R. 26).

4. Petitioner had been a deckhand continuously for nine years. He was thoroughly familiar and conversant with his duties. It was his duty to come outside (on the forward deck) when the boat was three or four feet away from the dock and *wait until the boat was in and then hook the boat up and slide the footboard over.* After this, he was to let the passengers out, and he and others were to let the motor vehicles off. He made over twenty round trips a day to South Street and was familiar with the bridge, the footboard and all other things there. (R. 45, 46, 48, 49, 50)

5. Prior to the accident, petitioner had gone through the passenger gate on the starboard side of the boat and was standing on the front end by said gate, waiting for the boat to come in (R. 34, 62).

6. As the front end of the boat approached the bridge, the left or "downtown" side was nearer to the bridge, and the deck of the boat on the left side came under the swing-back on that side first. At that time, the right or "uptown" side of the boat was three or four feet from the bridge. (R. 36, 62, 63)

7. When the right side of the boat on which petitioner was standing was about six inches from the bridge, he went to

reach for the cable with which to hook up his side of the boat. As he started to step on the bridge with his left foot, petitioner saw the foot board sticking out about two inches over the end of the bridge. He did not see the foot board until he made the step. When he first looked, he was already over balanced on the left foot and couldn't jump back. (R. 36, 37, 51, 59)

8. Petitioner's foot was caught between the boat and the bridge (R. 24).

9. Some vital factors, dispositive of petitioner's right to prevail, are:

a. There was nothing unusual about the operation of the boat (R. 23, 27, 28).

b. The weather was clear and it was daylight at the time (R. 27).

c. The boat and bridge were level with each other (R. 28).

d. The bridge was not unclean or slippery (R. 28, 39).

e. At the time of the accident, the footboard was lying flat on the bridge as it always lay (R. 26), and there is no testimony that the footboard was not in its customary or proper place, or that it was not where petitioner expected it to be.

f. As petitioner stepped from the boat to the bridge, he did not look where he was stepping (R. 59, 60).

g. There is an entire absence of proof in this case with respect to the standard imposed upon the ferry company in the use of footboards and any departure from that standard.

## ARGUMENT.

### I.

**The judgment of the New Jersey Court of Errors and Appeals in affirming the judgment of the New Jersey Supreme Court, which, in turn, affirmed the judgment of the trial court, is proper in the light of the federal statutes, and the decisions construing said statutes, and is not in conflict with same.**

The Jones Act does not make the employer an insurer. An employer's liability for injuries sustained by a seaman in the course of his employment rests upon the negligence of the employer, which negligence must be affirmatively proved. The burden of proving such negligence rests upon the employee, and is never presumed, *DeZon v. American President Lines,* 317 U.S. —, 63 Sup. Ct. Rep. 814; *Chicago M. & St. P. Ry. Co. v. Coogan,* 271 U. S. 472; *Gulf, M. & N. R. Co. v. Wells,* 275 U. S. 455; *Missouri Pac. R. Co. v. Aeby,* 275 U. S. 426; *New Orleans & N. E. R. Co., et al. v. Harris,* 247 U. S. 367.

Petitioner did not sustain the burden of proof imposed by law upon him.

The Complaint sets forth two allegations of negligence; namely, (1) that the gangplank (footboard) was carelessly, negligently and recklessly permitted to lie on the slip (bridge) extending beyond the edge of said slip (bridge) and (2) that the gangplank (footboard) was not properly and carefully fastened at the side of the dock in the place properly reserved for its keeping.

1. The only pertinent testimony with respect to petitioner's first allegation of negligence was that of the petitioner, as follows:

"A. Well, I believe the pilot gave the engineer the signal to bring the boat in and when the boat come in it come in pretty good in order to get underneath the bridge and as the boat was a few inches away, maybe six inches, I went to reach for the cable, what we call the rope and I couldn't reach and I had to put my foot on the bridge and I discovered the footboard was there and stuck out over the end of the bridge.

Q. Then what happened?

A. As I went to step on the bridge with my left foot I discovered the board was there, my balance was all to the left side, and I went on my knee. I missed it, missed the boat, and I went on my knee and I quick jumped up and when I did my foot was fast and it was sliding with the boat. I turned around, turned all the way around, like this (indicating) and I started to holler to the pilot, 'Hold the boat! please hold it!' (R. 36, 37.)

Q. When you came in you saw the footboard lying on the bridge, underneath the bridge spinning wheel?

A. I didn't, not at the time I came out the gate.

Q. Did you see at any time as you were coming in there the footboard lying on the bridge, underneath the bridge spinning wheel?

A. I didn't see it until I made the step. I didn't notice until I was making the step with the left foot.

Q. When did you look the first look?

A. When I went to pick up the cable to hook that up and I was already over-balanced on the left foot and I couldn't jump back. (R. 51)

Q. Pardon me, please. You put your foot on the top of the board, did you?

A. Yes.

Q. You did raise that high enough to put it on the top of the board?

A. High enough but it slipped down. (R. 57).

Q. This is what I want to know: Before you stepped off the boat on to the bridge, you looked down there to see where you were stepping, didn't you?

A. No, I wasn't watching there. I was watching for the boat to come in.

Q. So that you did not watch where you stepped, did you?

A. You didn't have to look where you stepped." (R. 59)

It is respectfully submitted that this testimony was clearly insufficient to justify a finding by a jury that the defendant carelessly, negligently and recklessly permitted the footboard to lie on the slip, extending beyond the edge of said slip and that such negligence was the proximate cause of the plaintiff's injuries.

2. There is absolutely no testimony with respect to the second allegation of negligence in this case. Furthermore, there was no proof of any rule, regulation, or requirement that the footboard be fastened at the side of the bridge, or of any custom or practice that the footboard was ever fastened at the side of the bridge. On the other hand, the uncontradicted and undisputed testimony of petitioner's witness, Mr. Cox, who was the bridgeman in charge of the bridge at South Street Ferry terminus, was that at the time of the accident he saw the footboard lying flat on the bridge and that "it always lays flat." (R. 26) This testimony conclusively disposes of petitioner's second allegation of negligence.

The trial court, considering all evidence adduced in sup-

port of the foregoing allegations of negligence, in disposing of respondent's motion for a non-suit, said,

> "THE COURT: The determination of this motion cannot rest upon any finding that the plaintiff was guilty of contributory negligence as a matter of law and therefore not entitled to recover, because in this kind of action, contributory negligence is not an absolute defense even where it does exist. We must search instead for the cause of the accident, the nature of the happening which produced injury to the plaintiff, * * * (R. 86)
>
> "Now, as to any place being reserved or that place being a proper place, there has been no proof, so that we may eliminate the idea of the board being properly or carefully fastened at any place, because there is no indication that there was a place for it, and that brings me to the inquiry as to what was a standard imposed upon the ferry company and what departure from that standard was there. The most that is said by the plaintiff is that the board extended beyond the edge of the slip. Now, it may have been perfectly proper for the board to have extended beyond the edge of the slip two inches, as he says, and without any negligence on the part of the defendant company. In fact, that might have been the accustomed place for it. There is nothing, in other words, that indicates to my mind wherein the company was negligent, what it did or what it permitted to be done or what it suffered to exist that was a departure from a standard imposed upon it.
>
> "Negligence is never presumed; it must be affirmatively shown. There is no indication in the plaintiff's proofs as to what may have been the proper place or the accustomed place or even a safe place for the

> board to be. I look upon this happening as something purely fortuitous, something that if produced by negligence at all, was more nearly produced by the sole negligence of the plaintiff than of anyone else, and not merely contributory negligence on his part. I can't adopt in my own mind any theory on which the plaintiff has shown a right to recover, and for that reason the motion must be granted." (R. 88)

The New Jersey Supreme Court examined the record to determine whether the facts shown by the testimony were such as to support an inference that the defendant company, through its agents, was negligent in permitting the footboard to lie on the surface of the dock extending slightly over the edge. That court, in its opinion of affirmance, inquired,

> "Where should the footboard have been? Was there a standard practice and, if so, what? Where, by the long continued practice of the defendant's employees, at that particular ferry, should it have been? Upon what act or word of the defendant or of the defendant's employees did plaintiff have justified reason to believe the footboard would be elsewhere?" (R. 110)

and determined that these questions are not answered in the proofs.

The federal courts have long recognized that in cases of this type it is incumbent upon the petitioner, in order to establish negligence on the part of the respondent, to show the safe or proper practice under the circumstances and also a deviation from or failure to observe that practice. *Buffalo & Grand Island Ferry Co. v. Williams,* 25 F. (2d) 612; *Calmar S. S. Corporation v. Taylor,* 92 F. (2d) 84, certiorari denied, 303 U. S. 643; *Union Ins. Co. v. Smith,* 124 U. S. 405.

Where a plaintiff has failed to sustain the burden of proof imposed upon him in cases arising under the Jones Act, this Court, as well as the other federal courts, has consistently upheld the authority and duty of the trial court to take the case from the jury and to find against the plaintiff. It has been repeatedly held by this Court that before evidence may be left with the jury there is a preliminary question for the judge to determine; namely, whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. *Atlantic Coast Line R. Co. v. Davis,* 279 U. S. 34; *Gulf M. & N. R. Co. v. Wells,* 275 U. S. 455; *Pennsylvania R. Co. v. Chamberlain,* 288 U. S. 333.

## II.

### Purpose of Writ of Certiorari.

The decisions are legion and uniform with respect to the attitude of this Court regarding the granting of petitions and directing the issuance of writs of certiorari. This is a jurisdiction to be exercised sparingly, only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U. S. 251.

In cases involving the propriety of the action of state courts in permitting or refusing to permit submission of cases to juries, it has been held by this Court that, to justify the issuance of a writ of certiorari, there should be palpable error. *Baugham v. N. Y. P. & N. R. Co.,* 241 U. S. 237. In the case of *Great Northern R. Co. v. Knapp,* 240 U. S. 464 which was a suit under the Federal Employer's Liability Act in which the question of the propriety of the

trial court's action in allowing the case to go to the jury was raised, Mr. Justice Hughes, in speaking for this Court, stated;

> "* * * The case, then, is one in which there is no question as to the interpretation of any provision of The Federal act, or as to the definition of legal principle in its application, but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a question of this sort unless error is palpable. The present case is not of this exceptional character, and we confine ourselves to an announcement of our conclusion. Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 673, 59 L. ed. 777, 781, 35 Sup. Ct. Rep. 481; Seaboard Air Line R. Co. v. Koennecke, 239 U. S. 352, 355, 60 L. ed. —. 36 Sup. Ct. Rep. 126."

## CONCLUSION.

It is therefore respectfully submitted that the Application for Writ of Certiorari should be denied and the Petition dismissed.

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